Butler Shoes New York, Inc. *and* Local 305, Retail, Wholesale and Department Store Employees Union, AFL-CIO. Cases 2-CA-17609 and 2-RC-18810

September 13, 1982

DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

BY MEMBERS JENKINS, ZIMMERMAN, AND HUNTER

On January 12, 1982, Administrative Law Judge Harold B. Lawrence issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed cross-exceptions, a supporting brief, and an answering brief to Respondent's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge only to the extent consistent herewith.

We agree with the Administrative Law Judge's finding, for the reasons set forth below, that Respondent violated Section 8(a)(1) of the Act by telling employees that they would lose benefits if they joined the Union. We also agree that Respondent further violated Section 8(a)(1) by interrogating employee Whitaker as to how he felt about the Union, and by threatening him that union support would result in a cut in his pay and a discontinuance of helping him within the Company. We also agree that the objections to the elections which correspond to the above complaint allegations should be sustained and that the election should be set aside. Our agreement with the Administrative Law Judge also extends to his dismissal of the complaint allegation that Respondent unlawfully promised and gave wage increases to employees after the election.

The Administrative Law Judge credited the testimony of employees Whitaker and Pasqualini that District Manager Lastinger told the employees that they "would" lose benefits if they joined the Union and further credited testimony that the prospective loss of benefits was not mentioned in conjunction with negotiations. We therefore find it unnecessary to pass on the Administrative Law Judge's conclusions that the result would be the same if Respondent had used only the word "could," and even if it had discussed this in the context of prospective negotiations.[2] Pasqualini testified unequivocally as to two occasions on which Lastinger told employees that unionization "would" result in a loss of profit-sharing and medical benefits and wages and Respondent's counsel did not cross-examine him on this point. Whitaker appeared at times to waver as to whether, at various meetings, Lastinger said "would" or something to the effect of "could," "can," or "might." However, Whitaker's unaided testimony, when not being led by counsel, was reasonably consistent in reporting the word used as "would." Whitaker sometimes adopted counsel's paraphrase of Lastinger's remarks which used one of the alternative words, but whenever the distinction between the exact words used was brought to his attention, he insisted that "would" was accurate. His use of alternate words, therefore, when considered in this context, does not require discrediting or ignoring his testimony. However, since Lastinger spoke on several occasions, his use of the word "would" on at least one occasion cannot be absolved by his possible use of "could" or its equivalent on another. At best, this would show that Lastinger himself used the words interchangeably, in which case any ambiguity must be resolved by finding here, as the Administrative Law Judge did, a threat and not merely a prediction.

Unlike the Administrative Law Judge, however, we find nothing unlawful in the prepared texts of the series of speeches delivered to employees by Lastinger and Boroughs in October 1980. As to Lastinger's October 4 speech, the Administrative Law Judge found either sinister overtones or actual

[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

We also find without merit Respondent's allegation of bias and prejudice on the part of the Administrative Law Judge. Upon our full consideration of the record, we perceive no evidence that the Administrative Law Judge prejudged the case or demonstrated any bias against Respondent in his analysis and discussion of the evidence. Nevertheless, we do not rely on the Administrative Law Judge's gratuitous characterization of General Counsel's witness Whitaker as lacking "the requisite ingenuity to fabricate a story." Such essays into the professional realm of the psychologist are always hazardous. See *Western Care, Inc. d/b/a Western Care Nursing Home*, 250 NLRB 509, fn. 2 (1980). Nor do we rely on the continued employment by Respondent of any of its witnesses in affirming the Administrative Law Judge's discrediting of some of their testimony. It is sufficient that the Administrative Law Judge was more impressed with the credibility of the General Counsel's witnesses Whitaker and Pasqualini.

[2] In this connection, we find *International Harvester Company*, 258 NLRB 1162 (1981), cited by the Administrative Law Judge, inapposite. Further, we do not rely on what the Administrative Law Judge characterizes as "Whitaker's apparent educational limitations." See fn. 1, *supra*.

threats in the following statements, taken collectively:[3]

> (1) [Please don't] let someone else decide your future.
>
> (2) I personally feel that, as of right now, you have a good job and a good place to work.
>
> (3) [The Company sets the wage policy, and in so doing tries to be as fair and competitive as possible. If the Union should be voted in, don't expect it to be able to make the Company] change its policy in that regard.
>
> (4) Further, it is not unusual for a union to state that just because you have the benefits today, there is no guarantee that you will have them tomorrow and that the company will take them away.
>
> (5) It is the Company that pays your wages and provides the benefits [and, if any changes are to be made, the Company must agree and the law states quite clearly that the Company does not have to agree or give in to any union demand which it feels is unreasonable.]
>
> (6) [The fact of the matter is that] job security depends on Butler's ability to sell merchandise [which meets its customers' demands at a profit in a very competitive market.] Job security depends on Butler's earning a profit sufficient to attract investors who will provide the money to the Company. Job security does not come from any union promises or union representation. You have more job security now than you would under a union contract or by working for another company.

In our view, these statements, either individually or in combination, amount to nothing more than an expression of Respondent's opinion of the relative merits of unionization and its rejection. Neither the context in which these statements were made nor their juxtaposition with other statements in the speech converts them into threats. See *Pearl Recycle Center*, 237 NLRB 491, 494 (1978) (statement that employees did not need a union); *Robert Bosch Corporation*, 256 NLRB 1036, 1045 (1981) (statements that the employer lawfully can offer less-than-existing wage rates and that the employer will act strictly in its own self-interest); *Wel-Tex of Headland, Inc.*, 236 NLRB 1001, 1004 (1978) (statement that employer need not agree to any union demands); *Caterpillar Tractor Company*, 257 NLRB 392, 396 (1981) (statement that union did not give employees any more job security).

[3] The bracketed material is part of the original statement by Lastinger from which the Administrative Law Judge excerpted unbracketed material.

The Administrative Law also found that the "threats of economic distress" in Lastinger's October 4 speech "were reinforced" by remarks he made on October 15.[4] We find, however, that the October 15 speech constituted permissible antiunion propaganda. The Administrative Law Judge faults Lastinger's reference to the possible adverse consequences of economic strikes which, perforce, result in loss of wages because, when combined with Lastinger's October 4 statement that Respondent's wage policy would remain unchanged, it creates an "ominous pattern" presumably suggestive of the inevitability of strikes. However, the Administrative Law Judge reads too much into the statement about an unchanged wage policy and ignores Lastinger's October 15 statement of Respondent's position on future bargaining strategy:

> The Union must come up with a reasonable agreement and persuade the company to do more than it is doing now and its usual argument is that the company is not competitive in the area of wages and benefits . . . . Economically, this company is doing now all that good business judgment dictates, and that is all it can be expected to do. I don't believe there is much, if anything, to be gained economically.

This excerpt, a representative sample of the tenor of the speech, manifestly reflects a willingness to bargain and cannot fairly be characterized as depicting either the futility of union representation, as the Board has construed this concept, or the inevitability of strikes, both of which consequences the speech elsewhere expressly disclaims. As Boroughs' speech contained nothing different from the substance of Lastinger's speeches, we find it, too, to be lawful.[5]

Nor do we find merit in the General Counsel's exception to the Administrative Law Judge's failure to find that Lastinger's October 4 speech and Boroughs' speech contained unlawful solicitations of grievances.[6] Lastinger reminded employees of Respondent's existing "open door policy whereby the employees are encouraged to take up any problems that they may have relating to their employment with their supervisor" or with higher man-

[4] Respondent excepts to the Administrative Law Judge's receipt into evidence, on his own motion, of the text of Lastinger's October 15 speech. We find that the Administrative Law Judge acted within his authority and did not abuse his discretion in receiving it. Moreover, as we find that the speech was lawful, Respondent was not prejudiced.

[5] Certainly there is nothing impermissible in Boroughs' reference to Respondent's intention to continue operating its stores in case of a strike, albeit this reasonably means that it intends to replace striking employees.

[6] It is not clear whether the Administrative Law Judge entertained this contention on the merits or not. Compare fn. 1 of his Decision with fn. 8 and the section of his Decision entitled "*The Objections to the Election.*" Nevertheless, as the speeches are in evidence and the issue of their lawfulness in other respects is before us, we shall address it.

agement, and stated that "Management sincerely wants to know what its employees are thinking and feeling because it feels that the comments and questions of the employees serve as guideposts." Boroughs echoed the substance of these remarks. Solicitation of grievances, however, is unlawful when it is a form of promise of benefit for rejecting a union and, therefore, may be violative when it expressly or impliedly includes a promise to redress such grievances as are submitted. Here, Respondent announced no new policy and did not imply that its response to grievances would change. Accordingly, it acted lawfully. Cf. *Chester Valley, Inc.*, 251 NLRB 1435, 1447–48 (1980).

The Administrative Law Judge found that District Manager Lastinger and employee Pasqualini engaged in a private conversation which, he implied, was unlawful in nature. The only private Lastinger-Pasqualini conversation about which there is record evidence, however, is an alleged interrogation in August or September 1980. The Administrative Law Judge's reference to threatening statements made to Pasqualini during some other conversation, in the section of his Decision entitled, "The Private Conversations," does not reveal the nature of the statement or statements and appears to be confused with Pasqualini's testimony with respect to threats of loss of benefits made at employee meetings in August and September. As to the alleged interrogation, Pasqualini was uncertain as to whether this occurred before or after he became a supervisor. We find, therefore, that the General Counsel has not proved by a preponderance of the evidence that this occurrence constituted an interrogation of a statutory "employee." Accordingly, we dismiss this allegation of the complaint.[7]

THE REMEDY

We have found that Respondent violated Section 8(a)(1) by threatening employees with loss of benefits and wage reductions and by interrogating employee Whitaker. We further find that the unfair labor practices are not so flagrant and pervasive as to make a fair election unlikely after appiication of the Board's conventional remedies. Therefore, we find it inappropriate to order Respondent to bargain without an election, and we shall direct a second election. Cf. *Bruce Duncan Co., Inc.*, 233 NLRB 1243, 1244, 1250–51 (1977); *C & E Stores, Inc.*, 221 NLRB 1321, fn. 2, 1327 (1976).

[7] Respondent's exception to the Administrative Law Judge's permitting the General Counsel to recall Pasqualini to testify, and its motion to strike his testimony, have no merit. In any event, Respondent was not prejudiced.

AMENDED CONCLUSIONS OF LAW

We adopt the Administrative Law Judge's Conclusions of Law 1, 2, 4, 8, and 9 but delete his Conclusions of Law 5 and 6. We also adopt his Conclusion of Law 3 as modified by deleting the words "with loss of jobs and," and we adopt his Conclusion of Law 7 as modified by deleting the words "and employment."

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Butler Shoes New York, Inc., White Plains, New York, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Coercively interrogating its employees concerning their union activities and sympathies.

(b) Interfering with, restraining, or coercing its employees by threatening its employees with loss or reduction of wages, profit sharing, and medical benefits.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Post at its place of business, located at Galleria Mall, White Plains, New York, copies of the attached notice marked "Appendix."[8] Copies of said notice, on forms provided by the Regional Director for Region 2, after being duly signed by an authorized representative of Respondent, shall be posted immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that copies of said notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director for Region 2, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

IT IS FURTHER ORDERED that the election conducted in Case 2-RC-18810 be, and it hereby is, set aside and that a new election be conducted as set forth in the direction below.

[Direction of Second Election and *Excelsior* footnote omitted from publication.]

[8] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To engage in activities together for the purpose of collective bargaining or other mutual aid or protection
To refrain from the exercise of any or all such activities.

WE WILL NOT do anything that interferes with these rights.

WE WILL NOT threaten you with reduction of wages, loss of profit-sharing, or loss of medical or any other benefits, if you select Local 305, Retail, Wholesale and Department Store Employees Union, AFL-CIO, or any union to represent you in collective bargaining with the Company.

WE WILL NOT interrogate you concerning your and/or any employees' union membership and support and reasons therefor.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

BUTLER SHOES NEW YORK, INC.

DECISION

STATEMENT OF THE CASE

HAROLD B. LAWRENCE, Administrative Law Judge: This consolidated case was heard before me in New York City on August 26, 27, and 28, 1981. The petition for election was filed on September 3, 1980, by Local 305, Retail, Wholesale and Department Store Employees Union, AFL-CIO (hereinafter Local 305 or the Union). On consent of Butler Shoes New York, Inc. (hereinafter the Respondent or the Employer), the election was conducted on October 17, 1980, and the Union lost. Objections were filed by the Union on October 22, 1980. The unfair labor practice charge underlying Case 2-CA-17609 was also filed by Local 305 on October 22, 1980. A complaint alleging a violation of Section 8(a)(1) and (5) of the National Labor Relations Act, as amended (hereinafter the Act), was issued on January 8, 1981.

The case arises out of the Respondent's alleged response to the Union's attempt to unionize the Respondent's shoe store at the Galleria Mall, White Plains, New York, which commenced shortly after it opened for business on August 5, 1980. The notice of hearing on objections and order consolidating cases sets forth that the unfair labor practices which the complaint alleges characterized the Respondent's preelection campaign against the Union, encompass conduct of such serious and substantial nature as to require the setting aside of the election and the issuance of a bargaining order. These are alleged to consist of promises of benefits if the Union lost and threats of losses of benefits if it won, unlawful interrogation concerning union activities, and interference with the free conduct of the election.

The complaint alleges the following unfair labor practices by the Employer: threats of reduced wages if the employees joined the Union; threats of loss of benefits, including profit sharing and medical benefits if they selected the Union as their bargaining representative; interrogation of employees regarding their union sympathies; promises of wage increases in order to induce them to reject the Union; refusal to recognize or bargain with the Union; unilaterally granting wage increases to its sales employees in November 1980. All of these acts are alleged to have been committed for the purpose of undermining the Union's majority status and interfering with, restraining, and coercing the employees in the exercise of rights guaranteed in Section 7 of the Act.[1]

The Employer's answer to the complaint, duly filed, denies the commission of any unfair labor practices. The Respondent contends that it did no more than carefully exercise its right of free speech, making known to its employees the considerable disadvantages to them of dealing with their employer through a union.

The parties were afforded full opportunity to be heard, to call, examine, and cross-examine witnesses, and to introduce relevant evidence. Post-hearing briefs have been filed on behalf of the General Counsel and the Respondent.

Upon the entire record and my observation of the demeanor of the witnesses and the manner in which they gave their testimony, and after consideration of the briefs submitted, I make the following:

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[1] At p. 24 of the General Counsel's brief, the General Counsel moved for "permission to amend the complaint to allege the speeches of Lastinger and Boroughs to unit employees as violative of Section 8(a)(1)." The proposed amendment is not otherwise spelled out. The texts of the speeches referred to are in evidence as Resp. Exhs. 18 and 21 and ALJ Exh. 1 and are already the basis of my finding of violations of Sec. 8(a)(1) and (5) by reason of threats contained therein as alleged in pars. 11 and 12 of the complaint and of my sustaining objections to the election herein numbered 1, 2, and 4. They are not evidence with respect to any other issue which may, in fairness, be said to have been litigated, such as whether the Respondent made promises respecting grievance machinery. Accordingly, the motion is denied. *Sheet Metal Workers' International Association, Local No. 71, AFL-CIO (H.J. Otten Company, Inc.)*, 193 NLRB 23, fn. 14 (1971); *The Estate of Alfred Kaskel, d/b/a Doral Hotel and Country Club*, 240 NLRB 1112, fn. 4 (1979).

FINDINGS OF FACT

I. JURISDICTION

There is no issue as to jurisdiction. The Respondent is a New York corporation which operates a chain of retail stores with gross sales of women's shoes and related items in excess of $500,000 and purchases and receives merchandise from points outside of New York State in excess of $50,000.

It is admitted and I find that Respondent is now and has been at all times material herein an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that Local 305, Retail, Wholesale and Department Store Employees Union, AFL-CIO, is now and has been at all times material herein a labor organization within the meaning of Section 2(5) of the Act.

II. THE APPROPRIATE BARGAINING UNIT

The complaint alleges, the Respondent's answer admits, and I find that the unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act consists of:

> All full-time and regular part-time sales employees employed by Respondent at its facility located in the Galleria Mall, White Plains, New York excluding all other employees, guards and supervisors as defined in the Act.

On August 18, 1980, the Union sent the Respondent a letter requesting recognition on the basis of signed authorization cards. The Respondent declined to recognize the Union.

III. THE UNION MAJORITY

The Union's demand for recognition was based on authorization cards signed by four of the five persons then employed at the store. Of the five cards in evidence, four are dated between August 12 and 16 and the fifth is dated August 22. The Respondent challenged three of the cards on the basis of the fact that some material had been excised from the bottoms of the cards and attempted on cross-examination of the business agent, Gaetano Mangano, to cast doubt upon the validity of all of the cards.

I find that no successful challenge to the validity of the cards has been mounted. At best, the Respondent has disclosed immaterial discrepancies between Mangano's testimony regarding the distribution, execution, and return to him of the cards and notes which he made regarding the same subject matter during the summer of 1980. However, the validity of an authorization card is not impugned by evidence that it was signed on August 16 and other evidence shows it was signed on August 17. In either case, Mangano had a valid authorization card in his possession on August 18, the day the Union demanded recognition.

The question raised by the Respondent's counsel regarding excision of printed material from the very bottoms of three of the authorization cards was answered without contradiction by Mangano's testimony that the deleted material consisted of a legend reading, "All names kept confidential." Such a legend appears on the other cards (G.C. Exhs. 3 and 4). The cards of employees Annette Collaboletta, Lawrence Whitaker, and Glen Spicer are the ones from which material was deleted. Whitaker and Spicer attended the hearing, but no testimony was adduced from either of them which would indicate that the cards were in any respect different in form from those they recalled signing. Anthony J. Pasqualini, another signer, also attended the hearing. Mangano testified that he gave Pasqualini a card on August 11, 1980, and another one on August 13, 1980, and that Pasqualini signed the card in front of him on August 13. Mangano's notes reflect that Pasqualini gave him a card on August 17, already signed. Either way, Mangano patently had a valid card from Pasqualini by August 18. No testimony was adduced from Pasqualini which in any manner brought its validity into question. Even Glen Spicer, who testified that nothing was cut off her card when she signed it, and that she could not remember what the missing material consisted of, also testified that she read the card and read each blank as she filled it in.

The Respondent failed to show any material alteration in any of the cards. Mangano's testimony is undisputed by any contradictory testimony and the discrepancies between his testimony and his notes are not material enough to raise any serious question about the validity of the cards.

I therefore find that the Union represented a majority of the employees in the bargaining unit pursuant to Section 9(a) of the Act on and after August 18, 1980, the date on which it demanded recognition as the collective-bargaining agent for the employees.

IV. THREAT OF LOSS OR REDUCTION OF WAGES AND BENEFITS

A. *The Formal Speeches*

The case against the Respondent rested initially on testimony by the Union's business agent and two former employees of the Respondent. The defense was based on the testimony of Ray Boroughs, vice president in charge of Sales Operations, Don Lastinger, New York district manager, Charles Novak, store manager, Glen Spicer, assistant store manager (who was formerly a member of the unit and signed one of the authorization cards), and some documentary evidence, including the text of a speech (Resp. Exh. 21) supposedly delivered by Lastinger strictly as written.

During the preelection period, four meetings with the employees were held at the behest of management on company time and at company expense. Three meetings were held on Saturday mornings at 9:30 in the stockroom in the rear of the store (one in August and the others on September 6 and October 4) and a fourth meeting was held on October 15 at 2:30 p.m. at Stouffer's Inn, White Plains, New York, which is located 5 miles from the store.[2] The employees came in their

[2] Since the Respondent's witnesses, possibly because of their access to company records, appeared to be better able than the employees to fix the dates of the meetings, I accept their timetable as accurate.

own transportation but were paid for their time. Norman Landa, assistant general counsel for labor affairs for Zale Corporation, a Texas based conglomerate which owns the Respondent and has other diversified retail interests, addressed the meeting of September 6; Don Lastinger, Respondent's New York district manager, read prepared speeches at the meetings of October 4 and 15; and Ray Boroughs, vice president in charge of store operations, addressed the meeting of October 15. The fact cannot be ignored that these speeches were not heard by disinterested persons, but by employees summoned to hear them from top management personnel on their employer's time.

Lastinger's first speech, entitled "Economic Speech," was delivered by him on October 4, 1980, and supposedly dealt with company benefits. The second speech, delivered on October 15, was on the subject of "unionism." Copies of what purport to be the texts of those speeches as actually delivered are in evidence respectively as Respondent's Exhibit 21 and Administrative Law Judge's Exhibit 1 (taken into evidence over the Respondent's objection). The prepared text of a speech entitled, "Pre-Election Talk To Be Given by Mr. Boroughs to Butler employees on October 15, 1980" is in evidence as Respondent's Exhibit 18.

Lastinger's October 4 speech was written by Norman Landa, with help from Boroughs and himself, and was illustrated with a blowup of the company benefits mounted on an easel. Near the beginning, Lastinger stated, "Within the next several days, we will be talking to you about the pros and cons of union membership and representation. However, this is not the purpose of today's meeting. Today, we want to discuss with you your job and the benefits and advantages of being a Butler's Shoe employee." However, though the speech was ostensibly limited to a discussion of company benefits, the text reveals emphasis on the status of employment and the speech was replete with both explicit and veiled threats to the economic security of the employees.

A warning at the outset of the speech that joining a union meant to "let someone else decide your future," established that the question before the employees was one that would definitely affect their future. An intimation of jeopardy to continued employment was contained in the statement, "I personally feel that, as of right now, you have a good job and a good place to work." It was intimated that the presence of the Union would have no effect upon wages whatsoever, because the Company would not change "its policy in that regard." A threat of withdrawal of benefits was made to sound like it came from the Union: "Further, it is not unusual for a union to state that just because you have the benefits today, there is no guarantee that you will have them tomorrow and that the company will take them away." This threat was coupled with a statement that "it is the company that pays your wages and provides the benefits."

An explicit threat to continued job security was made in the form of a statement regarding business problems which would be caused by the advent of the Union, without reference to any existing or potential situation which might entail economic peril to the Respondent in the event of unionization. Without reference to existing fact situations or past history, statements were made that "job security depends on Butler's earning a profit sufficient to attract investors who will provide the money to the company" or on Butler's ability to sell merchandise competitively and not on union promises or union representation. Diminution of job security was further explicitly threatened by the statement that, "You have more job security now than you would under a union contract or by working for another company." These gloomy prophecies cannot be read as a dispassionate analysis of the business outlook on the basis of existing, verifiable facts. They are irreconcilable with the Respondent's contradictory assertions to the employees that the Respondent equaled or surpassed the union wage scale and guided itself by the major provisions of union contracts with other shoe retailers in order to maintain its competitive position in obtaining competent employees (actions which, incidentally, appear not to have discouraged investment or yielded a business advantage to competitors).

The threats of economic distress contained in Lastinger's "economic speech" of October 4 were reinforced by remarks he made in his "unionism speech" on October 15 (ALJ Exh. 1). It was given to him to read at the meeting by Norman Landa and he testified that he did not know who wrote it. In that speech, the text of which was admitted into evidence over the Respondent's objection, Lastinger stated that loss of wages might be accompanied by "the possible loss of things you have bought on credit, the house, the TV set, the car, the appliances." The danger of repossession upon loss of credit was reiterated and it was noted that, "In this day and age creditors are just not willing to wait for their money." Adverse consequences were foreseen on the assumption that a strike would occur, for notwithstanding a disclaimer written into the speech to the effect that it was not being stated that the Union coming in would necessarily result in a strike, the combination of predictions made an ominous pattern. Having already said that the Employer's wage policy would remain unchanged, a careful distinction was drawn between an unfair labor practice strike and an economic strike, and their different effect upon the employees' right to return to work was carefully explained. Then it was stated flatly that since the Respondent Employer would not commit unfair labor practices, "any strike would be an economic strike" with the consequence that striking employees would be replaced, possibly permanently.

The speech delivered by Boroughs on October 15 again drove home the point "that the possible cost of unionism could be very high, with little or no gain on your part." Taking pains to make sure that the threats made on October 4 were not forgotten, Boroughs began his remarks with a specific reminder of the threats contained in Lastinger's speech: "Several weeks ago, Mr. Lastinger has held a meeting with you to discuss the Company, its benefits, and your job. Without going into great detail I would like to review again what Don said before." Echoing the threat of replacement contained in Lastinger's speech delivered that same afternoon, Boroughs stated that in the event of a strike the Company would

owe its chief obligations to its stockholders, investors, and customers, and would continue operating the stores "regardless of what happens." That, of course, could only be done by replacing striking employees. Not choosing to rely upon his listeners' ability to take a hint, he listed the benefits that the Company had given its workers long before the Union arrived on the scene and stated Butler's doctrine "that each employee is entitled to maximum job security."

Remarks of this character exceeded permissible bounds by threatening loss of employment and making purported predictions and assumptions which did not conform with verifiable fact and with the law. An employer may notify employees during a union campaign that if the union is voted in bargaining would be "from scratch" but may not couple such an observation with a threat of reduction of benefits or assertious that the employer will not grant benefits in negotiations with the Union which would not have been granted without a union, leaving the implication that the employer will not bargain in good faith and will force a strike, with resultant discharge of economic strikers.

The speeches read from prepared texts by Lastinger and Boroughs are reminiscent of a speech read from a prepared text by the employer in *Boaz Spinning Company, Inc.*, 177 NLRB 788 (1969), which caused the Board to comment:

> In arguing against unionism, an employer is free to discuss rationally the potency of strikes as a weapon and the effectiveness of the union seeking to represent its employees. It is, however, a different matter when the employer leads the employees to believe that they *must* strike in order to get concessions.[3]

The picture which was painted for the Butler employees put the danger to them in sharp focus: the Unions would demand wage hikes and induce what are known as economic strikes; the Company would not give in; economic strikers could be replaced; therefore, if the employees joined the Union, they were in danger of being replaced.

When an employer frames the issue of whether or not the employees should vote for a union purely in terms of what a strike might accomplish, he demonstrates an attitude of predetermination that bargaining will accomplish nothing; he is therefore not entering into collective bargaining in good faith and is indicating that he will not live up to the mandate of Section 8(a)(5). In *Boaz*, the message of futility of union representation was found to have been compounded by an express declaration that employees did not need a union to obtain benefits the employer would give them in any event; such remarks were also made by the Butler Shoe executives. The Board noted:

> Policy considerations dictate that employees should not be led to believe, before voting, that their choice is simply between no union or simply striking. That narrow choice is essentially what this employer gave them.

It is apparent from a reading of the texts that the three speeches made by Boroughs and Lastinger reiterated the theme of job security in such a fashion as to instill in the minds of the employees the fear that unionizing the store would, one way or another, cost them their jobs and resulted in economic privation.

If there is a deliberate attempt to create and sustain an atmosphere in which employees fear job loss as an inevitable consequence of voting for the Union, or if this is the cumulative effect of employer's conduct, the conduct is proscribed.[4] Thus, repeated references to strikes serve to reinforce an employer's explicit position that the employees would gain nothing by organizing.[5]

For the same reason, references may not be made to undercutting nonunion competitors, bankruptcy of unionized competitors, loss of business on account of union's organization efforts and availability of replacements from a large existing pool of unemployed.[6] An employer's assertion that the union could not improve the employees' wages and other benefits may be held to indicate the employer's intent to demonstrate to the employees that the union selection might well result in reduced wages, job security, and unemployment opportunities while rejection of the union would result in retention of present benefits and receipt of improved benefits.[7]

The Lastinger and Boroughs speeches constitute threats of loss of wages and benefits and threats to job security which clearly violated the Act and by themselves require invalidation of the results of the election. The speeches skirted the borderlines of permissible activity in other respects as well.[8]

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[3] 177 NLRB at 799.

[4] *Campbell Chain, Division of Unitec Industries, formerly Campbell Chain Company*, 180 NLRB 51 (1969).

[5] *Thomas Products Co. Division of Thomas Industries, Inc.*, 167 NLRB 732 (1967).

[6] *Liquid Transporters, Inc.*, 257 NLRB 345 (1981); *R. D. Cole Manufacturing Company*, 133 NLRB 1455 (1961).

[7] *Oak Manufacturing Company*, 141 NLRB 1323 (1963).

[8] The Lastinger speech of October 4, 1980 (Resp. Exh. 21), also dealt at length with grievance procedures, observing that:

> Management sincerely wants to know what its employees are thinking and feeling because it feels that the comments and questions of the employees serve as guideposts. They point the way to answers which will make it possible for everyone to have a better life.
>
> * * * * * *
>
> . . . no one is more interested in getting more for you than management. Butlers, myself, Lastinger, and Mr. Novak want you to stay and be happy, and will devote much time and attention to this end. . . .

This invitation to air grievances comes close to, but does not quite amount to, an explicit promise to remedy them "thereby constituting a form of impermissible promise or benefit to discourage union support." *First Data Resources, Inc.*, 241 NLRB 713, 723 (1979). In addition, it was stated that by joining a union "you give up your independence," thereby placing the well-being of the employee's family in the hands of "total strangers" and that "no longer are you able to speak directly to management about your wages or hours or your working conditions. You lose that right." No mention is made of provisions of the Act which preserve the right of employees to discuss grievances directly with an employer in the company of a union representative. (ALJ Exh. 1)

B. *Other Threats Made at the Meetings*

Lastinger testified emphatically that his statements to employees, with certain minor exceptions, were confined to those which he made in the meetings held on October 4 and 15, 1980, and that he and Boroughs confined their remarks to the prepared texts which are in evidence. However, former employees Lawrence Whitaker and Anthony Pasqualini testified credibly that additional threats of loss or reduction of wages and benefits were made by Lastinger, aside from the statements which he read from the prepared speeches (or, in one case, from cards to which he had transferred the text).

There is sharp dispute regarding whether Lastinger stated that benefits "could" be lost or whether he asserted that they "would" be lost, the employees having tended to use the terms interchangeably. There is also dispute as to whether he had connected such potential loss with the contingencies and uncertainties of collective-bargaining negotiations or whether in his remarks he had anticipated loss as an automatic corollary of the advent of the Union.

According to Whitaker, Lastinger stated during Saturday morning meetings in August and September that benefits *would* be lost if the employees joined the Union. On the second occasion, he handed out booklets describing company benefits and stated that profit-sharing and medical benefits *could* be lost. (Glen Spicer testified that the booklets were distributed at a meeting held at the store in August.) He also testified that Lastinger made no mention of any possibility that profit-sharing and pension matters might be subject to negotiation, but simply stated that company benefits *might* be lost if the Union came in. According to Whitaker, at one meeting Whitaker asked about the union benefits and asked why there would be a loss of some company benefits if they joined the Union, but he never received a clear explanation. The Respondent's witnesses uniformly asserted that no questions whatsoever were asked at any of the meetings by any of the employees.

In the last analysis, it was clear that Whitaker's recollection was that Lastinger did not merely say that benefits "could" be lost but stated that they "would" be lost. The Respondent in his post-hearing brief argues, "A critical factual issue throughout this matter is credibility with respect to the use of the word 'could' versus 'would.'" I do not view this as a critical factual issue affecting credibility. I think all of the employee witnesses were of an educational and sophisticated level at which they would tend to use the two words interchangeably. The context in which the word was used, in every case, required that the statement being quoted be interpreted as threatening that wages "would" be cut or benefits lost or reduced. The context requires that even if the word used actually was "could," the overall result would still be that the remark constituted a threat against the job security, the wages, and the benefits of the employee to whom the remarks were addressed. Such a construction is required of any statement that the employees "could" lose benefits in negotiations with the Union which is coupled with statements by the Employer that the Union would not is coupled with statements by the Employer that the Union would not necessarily get what it sought in negotiations and that in certain respects the Employer would not give more in negotiations than it would have given without the Union.

Consideration of Whitaker's credibility is appropriate in connection with the matter of the degree of certainty and definiteness with which he says Lastinger predicted loss of wages and benefits and in connection with the matter of whether he said the loss would occur in the course of negotiations or independently thereof. His testimony on direct examination was simple and straightforward. He quoted Lastinger as follows: "He was telling us about he heard everybody was in a union and he knows about their benefits and he was telling about between ours and their benefits that ours, if we had joined the union, our benefits would be cut."

On cross-examination, counsel for the Respondent seemed to have obtained concessions from Whitaker that Lastinger talked about the differences between the Union and the Company and specifically mentioned negotiations, stating that there could be a possible loss of benefits as a result of negotiations. Whitaker stated in reply to one question that Lastinger had mentioned negotiations. However, on being pressed by the cross-examiner, Whitaker receded from that statement and the following exchange took place:

> Q. You could lose through negotiations, correct?
>
> A. Yes.
>
> Q. And, indeed, he kept saying negotiations, right?
>
> A. Not exactly, no, he just said that we would lose these benefits, yes, if we would join the union.
>
> Q. But, that was through negotiations—
>
> MS. SOBIN: Let the witness finish his—
>
> JUDGE LAWRENCE: Was there anything else that you wanted to add?
>
> THE WITNESS: No that was it.

Whitaker repeatedly corrected the cross-examiner on this point, stating that Lastinger's statement that benefits could be lost was not made in connection with any reference to negotiations. The witness, having testified that benefits were discussed at all the meetings, was asked, "And, the same thing was, here are your benefits, and you could lose them through negotiations." The witness replied, "Didn't say negotiations, he said we could lose them, was it." At a later stage of his cross-examination, when he was asked whether at the first meeting in the store Lastinger had said that they could lose benefits, the witness again corrected counsel and testified that the statement was that they "would" lose them:

> Q. At this first meeting, did you likewise talk about benefits?
>
> A. Yes.
>
> Q. Did you talk about the union benefits?
>
> A. Yes.
>
> Q. Did you talk about how you could lose benefits—
>
> A. Yes.
>
> Q. By and through negotiations?

A. Through the union, yes, that is what he said, we could lose benefits.

Q. Did he mention negotiations, too?

A. No, no negotiations mentioned, no word negotiations mentioned.

Q. No word negotiations—

A. No word negotiations mentioned.

And again:

Q. But, he did say in this last meeting that you are talking about, right before the election, that you could lose these benefits through negotiations, correct?

A. I can lose them, yes.

Q. Through negotiations, correct?

A. Yes.

Q. And, that goes to medical, correct?

A. Yes.

Q. Profit sharing?

A. Yes.

Q. What else, you tell me what he said?

A. Well, the profit sharing, whatever the benefits were we would lose.

Q. You could lose through negotiations, correct?

A. Yes.

Q. And, indeed, he kept saying negotiations, right?

A. Not exactly, no, he just said that we would lose these benefits, yes, if we would join the union.

In its post-hearing brief,[9] the Respondent argued, "It is clear that Whitaker didn't understand the concept of negotiations and the difference between would or could." The pattern of conduct on the part of the management personnel of Butler Shoes supports an inference that this is precisely what they were counting on. They knew that a statement to a person with Whitaker's apparent educational limitations to the effect that benefits could be lost in negotiations is tantamount to an unqualified statement that benefits were definitely going to be lost. Besides, the ignorance imputed to him would tend to make it difficult, if not impossible, for him to slant his testimony if he were so inclined.

In any event, the making of a threat, though coupled with the mention of negotiations, can still constitute an unfair labor practice and a valid objection to an election. Even if credence were given to the Respondent's contention that loss of benefits was only mentioned in connection with the fact that benefits would be a matter for negotiations with the Union,[10] due consideration must be given to its statements to the employees that certain union benefits which were part of the Zale benefit package did not take effect under the union contract for a period of 2 years after the inception of the contract in any particular store and that the benefit package offered by the Zale Corporation was superior to that which had been negotiated by the Union.

In *International Harvester Company*, 258 NLRB 1162 (1981), it was held that an employer's retraction of a coercive threat of loss of benefits was inadequate because in clarifying its statement by a later statement that the benefits would be subject to negotiations, it reminded the employees that no UAW-organized clerical unit had been able to negotiate a retention of the benefits in their contracts, and was thus held to have failed to cure the coercive effects of its earlier remarks. The statements Lastinger claims to have made about negotiations had the same effect.

Notwithstanding that on cross-examination Whitaker lapsed into complete confusion as to dates when the meetings took place and as to who was present at particular meetings, matters which were of little moment to him, he appears to have retained a clear and unambiguous recollection that at the meetings certain comments were made by the speakers which intimately affected his financial prospects. There is no reason to disbelieve him, especially as similar remarks are quoted by another employee.

Anthony J. Pasqualini, hired to work in sales full time and subsequently promoted to assistant manager, testified that at a meeting in August 1980 Lastinger stated that if the employees joined the Union they would lose profit sharing and there would be a wage drop, and that at another meeting in late September or early October, he enlarged his statement to include a loss of medical benefits, because Butler's medical plan was a lot better than the Union's. Interestingly, Pasqualini's testimony ties the predicted drop in wages and benefits to negotiations, but not in the manner contended for by the Respondent. Pasqualini recalled statements being made at one of the meetings to the effect that if the employees joined the Union they would lose the Company's profit sharing and would have to work for 2 years under the Union plan before profit sharing under that plan would begin, and that a wage drop would occur because wages would have to be negotiated and the Union would not have as much weight as it said it would have. Reference has already been made to the comments made about the Company's fixed position respecting wages. These additional comments could only have left the employees with the impression that it was preordained that in negotiations the Union would be bested and the employees, instead of making gains, would lose ground.

In his own testimony, Lastinger denied having made the statements attributed to him and the Respondent also elicited testimony from Glen Spicer to the effect that she was unable to recall anything being said about benefits at either of the two (rather than four) meetings which she recalled and that Lastinger did not, at either meeting, say there would be a pay cut. I cannot credit Lastinger's denials.

In the face of contradictory accusations and denials, I have accepted as credible some, but not all, of the testimony offered on behalf of management and some, but not all, of the testimony offered on behalf of the Petitioner. Pasqualini's testimony was given in a very forthright,

[9] Resp. br. p. 65.

[10] Respondent's reliance upon *Newport News Ship Building and Drydock Company*, 239 NLRB 82, 91 (1978), for the proposition that "unrealistic standards which insist on improbable purity of word on the part of the parties . . ." must be avoided is misplaced, inasmuch as it ignores the fact that this case dealt with the technical aspects of conduct of an NLRB election by the representatives of the NLRB itself, rather than unfair labor practices on the part of the employer.

positive manner. Upon direct and cross-examination, he gave slightly discrepant versions of his conversation with Lastinger about the signing of membership cards, but any discrepancies are immaterial and I find him to be a credible witness. Whitaker appears to be uncertain in his testimony as to various matters, indicating poor recollection of the contents of Lastinger's speeches, failure to remember a pay raise which he received in February 1981, and lack of recall respecting matters such as the number of meetings which were held, their dates, and which of the meetings Boroughs attended. These matters, however, are peripheral to the issues of this case and the fact that he was a poor witness respecting them does not compel rejection of his testimony on other matters of greater importance to the central issues herein. His testimony was positive regarding his recollection of the contents of certain statements which he heard made during meetings and in private conversations respecting matters with which he would be expected to be greatly concerned. As a witness under oath, he appeared to be making a sincere attempt to testify in accordance with his best recollection and I have no reason to doubt his candor. His errors as to the time, place, and context of the statements he attributes to Boroughs and Lastinger, therefore, do not require rejection of his testimony regarding the substance of these statements, which intimately affected his financial prospects.

However, the testimony of Lastinger, Boroughs, and Novak is rendered suspect because of their continued employment by Respondent, contradictions between Lastinger's testimony and the texts of the speeches and remarks made by Boroughs and implausible testimony by Novak.[11]

As to Spicer, who is presently an assistant manager at the store, I find that I have great trouble accepting her testimony on any of the issues of this case, and not only because of her present position with the Respondent. She testified slowly, reluctantly, and seemingly while under a cloud. She appeared to be making a conscious but unsuccessful attempt to recall the events in issue. According to her, there were only two meetings, one at the store and one at Stouffer's Inn, which is at variance with all of the reliable evidence in the case submitted by both sides. It is thus impossible to accord any weight to her testimony.

C. *The Private Conversations*

Besides asserting that threatening statements were made at the meetings which do not appear in the texts of the speeches introduced into evidence, both Pasqualini and Whitaker testified to additional statements made to them in private conversations which are violative of the Act. Boroughs and Lastinger flatly deny having made the statements attributed to them.

Whitaker claimed to have had a personal conversation with Lastinger at which Charles Novak, the store manager, was present. He testified that Lastinger called him into the back of the store and in the presence of Charles Novak "he explained to me about the Union, he said he heard that people were joining the Union, he don't know and that if I did I would have to take a cut in pay, that was his main thing there."

Whitaker also testified that on one occasion, possibly in September, Ray Boroughs took him to lunch. He quoted Boroughs as stating during this lunch meeting that he did not care if there was or was not a union, but it was his opinion that unions were no good and that union people were lying to the employees, and that if Whitaker joined the Union, Boroughs would not be able to help him further in the Company. This prediction of a chill in relations can only be viewed as a threat.

Boroughs testified that he did not take Whitaker out for lunch but that actually they went down for coffee, and he denies having made the ominous statement attributed to him. According to him, the conversation was devoted entirely to the subject of boxing, a common interest of the two men. He noted that top-echelon executives of the Company frequently take employees out for lunch or for a snack in order to get to know the people in the Company and obtain information about what is going on with the customers in the stores. Thus, in September he had dinner with Glen Spicer and they went shopping. Boroughs insisted that he never asked anybody, and specifically he never asked Larry Whitaker, how he felt about the Union.

Lastinger testified that remarks which he made to Pasqualini and Whitaker about profit sharing were extremely circumscribed and were made in a private conversation which took place some time after the October 4 meeting. He asserts the conversation was confined to the following: "Only to say that after I explained how the profit sharing worked, then I told them that through negotiations—when they are negotiating their contract for them, that they could lose that kind of a benefit."

The testimony of Whitaker and Pasqualini, both of whom are now employed elsewhere, appears to be plausible and credible with respect to these conversations. Neither has any motive to testify other than to his best recollection of the actual statements made, which are of an exceedingly simple nature and relate to matters having direct impact upon the personal interests of the witnesses. Whitaker, who appeared to me to lack the requisite ingenuity to fabricate a story, had clear recollection regarding matters with respect to which witnesses' memories may ordinarily be expected to be sharp, and was forgetful and dim regarding matters of detail of lesser importance. Pasqualini's demeanor especially encourages credence, as does the fact that fairly similar statements and outlook on the part of Lastinger are re-

[11] Though Lastinger testified he avoided discussions with employees, a statement in the October 4 speech shows intent to discuss "the pros and cons of Union membership and representation." He claimed to have read both speeches, the texts of which are in evidence, *verbatim*, though that would have been impossible because of blanks and references to the anonymous author's "personal experiences." His testimony was not compatible with Boroughs' respecting the meeting of October 15. Boroughs emphasized that the reason for holding the meeting of employees at Stouffer's Inn was to "get them out of the working environment" so that they could think more clearly. Lastinger asserted that the meeting was held there because one of the Saturday morning meetings ran overtime and a warning had been received from the management of the Galleria Mall about opening the store late. He also made a statement to the effect that the space in the store was felt to be inadequate though his earlier testimony indicated that the back room of the store had ample space for such a meeting.

flected in a conversation which Lastinger had with Mangano, the Union's business representative.

According to Mangano, he met Lastinger on August 18, 1980, in front of the Butler Shoe store at the Mall. He identified himself and stated that the Union was demanding recognition to represent the sales personnel in the store. He quotes Lastinger as saying that, "he doesn't know why the people would want to join a union, if they would join a union he told me, that they would lose their benefits, such as Major Medical, he said that they would also lose their profit sharing." Lastinger is also quoted by Mangano as stating "that they would or could lose wages by joining union, so he sees no reason why they would want the union and our conversation basically ended there." In the course of the conversation, according to Mangano, Lastinger had cited his own profit sharing as currently amounting to over $20,000, and said that "if they would join the union they would not be eligible for their profit sharing plan, they would lose their Major Medical Plan."

While it may be questioned whether Lastinger would have disclosed his private financial affairs to a union representative, in the context and circumstances of this particular conversation such a disclosure cannot be said to be improbable or impossible. It was relevant. More importantly, Mangano's testimony, besides being consistent with that of disinterested witnesses, is consistent with key elements of Lastinger's own version of the conversation.

Clearly revealing the apprehension with which management viewed efforts at union organization, Lastinger testified that on a visit to the Mall in August he had been alerted to the presence of the union organizer by the manager of a neighboring business establishment. After he arrived at the shoe store and greeted everyone, he went outside to talk to Mangano. He introduced himself to Mangano. Mangano identified himself and stated that Local 305 claimed to represent the people in the store. Lastinger then testified as follows:

> I told him at that time that I didn't think that our people needed to be represented by the Union, that our people had a complete benefit package, they had profit sharing, Major Medical, and things of that nature, etc., and I also stated that if they were represented by a union they could lose part of those benefits and then the other thing that I told him was, if you are going to talk to my people I want you to be very fair and very honest and I went back into the store.

These remarks to the union agent are of the same tenor as the statements which Pasqualini and Whitaker attribute to him. It is speculative whether he would reasonably be expected to have been more emphatic in conversation with employees than he would have been when talking to a representative of the Union, but it is to be noted that Lastinger testified that he was instructed by Norman Landa, the assistant general counsel for labor relations of Zale Corporation when Landa came into New York on September 6, 1980, not to discuss wages or promotions with any employee at all and he followed the instructions to the letter. However, in mid-August he was not under any restrictions and there is no reason to think that during that period he did not speak his mind.

The Respondent's counsel went to great lengths to impeach Mangano's credibility but did not succeed where it counted. Emphasis was placed on a misdescription of the physical layout of the Mall and the fact that Mangano's attitude about the need for accuracy in note-taking appeared to be somewhat less than what it should have been. The latter point did produce some peculiar testimony. Mangano had testified that even though he was told by a lawyer to make a record of the history of his unionizing efforts in several stores at the Mall, he did not take even routine pains to ensure accuracy. However, such attempts at impeachment are unavailing in the face of Lastinger's testimony showing that his remarks were substantially similar to the remarks attributed to him by Mangano. Here again, the difference centers around whether he said the employees "would" or "could" incur losses. In his testimony on direct examination, Mangano testified that Lastinger had said that they "could" lose Major Medical and profit sharing. On cross-examination he quoted Lastinger as saying they "would" lose them, and he began to use the terms interchangeably.

It is obvious that none of the witnesses in this case have been the recipients of schooling which would imbue them with an appreciation of the occasional need for rigorously precise use of language. They would tend to find semantic distinctions elusive. What is important is not which word they used, but whether under all the circumstances an assertion by Lastinger that they "could" lose those benefits was tantamount to a prediction that they "would" lose them. On cross-examination, Mangano, who also appears to have found the semantic differences elusive, reverted to what he had stated in an affidavit given by him to an interviewer at the NLRB, in which he quoted Lastinger as stating, "We pay average wages and if the union comes in the employees will lose their company benefits and their profit-sharing plan, which is very good." In the affidavit, Mangano went on to assert that he told Lastinger that he (Lastinger) could not (undoubtedly meaning "should not") tell the people that they would lose benefits or wages by joining the Union, to which he says Lastinger replied, "They will lose their profit sharing."

V. PROMISE OF WAGE INCREASES AND OTHER BENEFITS

The complaint alleges that in order to reduce union support the Respondent promised employees a wage increase on or about October 24, 1980, and actually gave increases to all the employees in November 1980.

The grant of a wage increase after an election and while objections are pending can be the basis of an unfair labor practice charge. The fact that it came about in some fashion which was not typical of normal company practice may be evidence that it was not given for a lawful purpose. The question to be resolved is whether the Board can conclude that the Employer's grant of a wage increase, such as a substantial across-the-board in-

crease, was for the purpose of thwarting the employees' organizing initiative[12] or, in the case of a postelection increase, was given as a reward for the nonunion vote of the employees.[13] It is incumbent upon the General Counsel to offer evidence which would justify an inference that the Employer's explanations of its actions were unfounded or that its professed reasons were not the true motivating considerations for the increase. This can consist of any evidence which would support a finding that the wage increase was granted in order to affect the results of the election, such as a 20-percent-wage increase granted to most employees at an unusual time of the year.[14]

In the present case, the evidence respecting the promise of a wage increase consists entirely of Whitaker's testimony that immediately after the ballots were counted at the election held on October 17, 1980, Lastinger told him that "everybody was receiving raises pretty soon, in the next month or so." There is no corroborative evidence that such a statement was made. Lastinger denies having made it. Boroughs says he was within earshot of Lastinger throughout the election and did not hear it. No one else appears to have heard it. It is improbable. Accordingly, Whitaker's version of the events of that day cannot be accepted and must be ascribed to his general confusion regarding the dates of the events to which he testified. Borough's testimony, discussed below, to the effect that wages were subject to periodic review conducted in conformity with policy set down before the Union appeared on the scene, appears to be completely credible. Whitaker may have had in mind the conversation which undoubtedly took place when Lastinger interviewed him at the end of October. This is suggested by the fact that Whitaker contradicted himself as to the timing of Lastinger's statement to him that they would be receiving a pay raise, testifying at one point that this was stated immediately after the balloting, while at another point his recollection was that about a week after the election Lastinger told him that they would be receiving a raise within a month's time. The inherent probabilities of the situation negate a likelihood that Lastinger would single Whitaker out for the news that there was going to be a wage increase or that he would do so at that particular time and place. The commission of such an indiscretion would have been uncharacteristic, being at odds with his demeanor, his testimony, and his record of accomplishment within the Respondent Company. There is no other evidence in the record that an actual promise of a wage increase was made to any employee. Accordingly, I find that Lastinger did not in fact tell Whitaker, immediately after the balloting, or in any improper circumstances, that Whitaker was going to get a pay raise.

The question remains whether the pay raises granted to the employees in November 1980 were granted pursuant to a pre-existing company plan for the evaluation of employees or whether they were given in connection with the election. The evidence shows that within a month after the election every employee in the store, including Whitaker, received an increase in wages and that it was given pursuant to a preexisting arrangement and was altogether unconnected with either the election or the results of the election.

Butler Shoes is a nationwide sales organization, which has been owned since 1969 by a conglomerate known as Zale Corporation, which has diversified retail interests. When Butler Shoe Company became a subsidiary of Zale Corporation, the employee benefit package of Zale Corporation became an automatic benefit package for employees of Butler Shoe Corporation, and extension of such benefits to any new employee was automatic.

In August 1976, the Wise Shoe Stores chain was acquired by Butler from Genesco. These stores were already under contract with Local 287, Retail Shoe Employees Union. In 1980, when the events of this case transpired, the unionized Butler Shoe Stores were operating under the terms of that contract even though it had expired in 1979. According to Boroughs, this was because negotiations were in progress and it was necessary to comply with those terms in order for the Respondent to remain competitive in its ability to attract employees. The pay scale provided for in the contract between the Union and the shoe stores in New York called for periodic pay increases for trainee salesmen.

According to Boroughs and Lastinger, the lease for the store in the Galleria Mall was signed on September 17, 1979. Upon being advised that the lease had been signed, Boroughs decided that the pay scale there would be the same as the pay scale in New York. The Zale Corporation benefits package automatically applied to the new store. However, there was a substantial difference between the procedure followed with respect to wage increases in the New York stores subject to union contract and the procedure set up for White Plains. Boroughs directed that the employees in White Plains be reviewed for an increase on a periodic basis. The review was to be automatic, but the pay increase was not, as it was in New York. According to Boroughs, the reason for the difference is that salesmen in White Plains had a higher commission rate. Boroughs testified that he decided that employee performance would be reviewed every 90 days and decisions regarding wage increases made at those times, in order to keep the Company competitive in its ability to attract competent employees. When Lastinger became district manager in the New York area around July 1, 1980, just before the Galleria Mall store opened, he was called to Atlanta to see Boroughs. Boroughs acquainted him with the policy decision he had made regarding the White Plains store: there would be a periodical review of employees' performance but the amount of the increase was not set. He told him to review the performance of inexperienced salespersons in the White Plains store on a 90-day basis.

Thus, on August 5, 1980, when the Galleria Mall store opened, the new employees had profit sharing, medical benefits, dental benefits, paid vacations, and certain other benefits, including the right to participate in some contributory investment plans. Employer's Exhibit 13 de-

[12] *Skaggs Drug Centers, Inc.*, 197 NLRB 1240 (1972).

[13] *Louisiana Plastics, Inc., Subsidiary of Bemis Bag Company, Inc.*, 173 NLRB 1427 (1968).

[14] Louisiana Plastics, Inc.; *id.; N.L.R.B.* v. *Exchange Parts*, 375 U.S. 405 (1964); *Raley's, Inc.*, 236 NLRB 971 (1978).

scribes the benefits. Booklets advising the employees of same were distributed in routine course as the new store was stocked and organized. No relationship between such distribution and the pendency of the election has been proved.

What happened in Whitaker's case is consistent with this history. Larry Whitaker was hired at $3.75 per hour to work in the stockroom while the store was being prepared for opening. When he was made a salesperson on opening day of the store he began receiving an inexperienced salesperson's salary of $4 per hour against 8-1/2-percent commission. In November he received an increase to $4.10 an hour and on February 28, 1981, he received an increase to $4.35 per hour. The withholding authorizations, Exhibits 16 and 17, reflect the 90-day review policy. He left the employ of Butler Shoes at the end of June.

The evidence shows that Whitaker did not have a review interview or receive a further pay increase after February 1981. By itself, without any other evidence explaining it, this omission does not negate the existence of the review policy or establish that the earlier reviews and increases were election-connected. In the absence of some proof of the actual reason for the omission, it must be found that the Company had a policy of systematic review of employee performance and wages, which it adhered to during the election period without any attempt to manipulate wage increases in order to affect the outcome of the union organization drive. The instant case lacks the features which have led the Board in other cases to find wage increases to be violative of the Act, such as suspicious timing in substituting it for another emolument with animus reflected in other unfair labor practices,[15] response by the employer to repeated complaints about pay scale,[16] or a complete lack of any preexisting policy or program.[17]

Each case depends upon its own circumstances. Even an unusual raise may be justified if there is no evidence to indicate that the Union's filing of a petition for an election caused or affected the decision to grant the wage increases.[18]

The General Counsel cites the case of *Honolulu Sporting Goods Co. Ltd., a Subsidiary of Zale Corporation*, 239 NLRB 1277 (1979), in which Zale Corporation, the Respondent's parent corporation, was found guilty of violations of Section 8(a)(5) and (1) of the Act and a bargaining order was issued. In that case, Zale argued as the Respondent does in the present case, that wage increases which had been granted after the Union filed a Petition for Certification were given in compliance with a preexisting wage structure. Even the same attorney for labor relations, Norman M. Landa, was involved. However, I do not find that case applicable on the issue of the wage increase. To begin with, the Respondent, not Zale Corporation, is the Employer in this case. Secondly, in the *Honolulu* case, evidence was introduced which rebutted the contention that the employer was merely complying with a preexisting wage structure. In the present case, no evidence has been introduced to contradict the testimony of Boroughs and Landa, which I find credible on this issue, that a wage policy had been set as soon as the lease of the store in the Galleria Mall had been signed.

In view of my finding that, in granting the wage increases, the Respondent was merely complying with preexisting procedures and commitments, I must also overrule the General Counsel's contention that the Respondent's unilateral action in granting the wage increase violated its obligation to bargain with the Union, which represented the employees after August 16, 1980, and had made a demand for recognition on August 18, 1980.

VI. INTERROGATION OF EMPLOYEES CONCERNING UNION ACTIVITIES

Pasqualini testified that the first conversation he had with Lastinger regarding the Union occurred approximately a week after he had signed the card.[19] He was in the backroom putting shoes away and he walked out in front as Lastinger entered the store. He believed that everybody had signed the cards and that Lastinger had got wind that that had occurred. He quoted Lastinger as saying: "I heard you signed a union card" and testified that when he said nothing in reply, Lastinger continued: "You don't have to lie, I know you all did." Pasqualini then admitted he signed the union card, whereupon Lastinger said, "I don't want you to join the Union." Pasqualini says he shrugged his shoulders and walked away from him because he felt uncomfortable.

On cross-examination Pasqualini placed the time of the conversation in the week of August 20 and quoted Lastinger as saying: "I heard you signed a card," and when he did not answer Lastinger continued, "I heard you all signed cards," upon which Pasqualini admitted that he had done so.

Taken literally, and in light of other statements attributed to Lastinger in this conversation, such as his opinionated account of his experience with unions in New York City, the remarks attributed to Lastinger considered as a whole indicate a context of unlawful interrogation. There was no lawful purpose which could have been served by the making of such an inquiry. The union activity was not secret. Lastinger quickly learned from a neighboring merchant that an organizer was about and that Whitaker and Pasqualini had signed authorization cards and it was another employee, Angela Collaboletta, who at one meeting advised everybody of the date of the hearing on the petition for an election. Lastinger testified he spoke directly to Mangano in mid-August. The Union demanded recognition in mid-August.

During his testimony, Boroughs complained that Mangano hovered closely over his coffeebreak with Whitaker. It appears to have been fairly obvious from the be-

[15] *National Care and Convalescent Industries, Inc. d/b/a Elmwood Nursing Home*, 238 NLRB 346 (1978). In this case the Board considered it significant that the record failed to set forth what if anything prompted respondent to consider a change at that time. In the present case, the Respondent has explained satisfactorily the reasons for the initiation of the policy with respect to the new store.

[16] *Raley's, Inc., supra.*

[17] *Tipton Electric Company*, 242 NLRB 202 (1979).

[18] *FMC Corporation, Power Control Division*, 216 NLRB 476 (1975); *Marine World USA*, 236 NLRB 89 (1978).

[19] This requires exclusion of consideration of Lastinger's conversation with Pasqualini as a basis for Objection 3 to the election since the petition for election was not filed until September 3, 1980.

ginning that the Union had authorization cards from all of the employees. The store was an extremely small store which opened with only five employees. Consequently, the fact that a majority of the employees had signed authorization cards had to have been known to management almost from the beginning.

Borough's statement to Whitaker that he could not do much for him if he joined the Union followed a question put to Whitaker by Boroughs as to how he felt about the Union and Whitaker's response that he was still thinking about it. The threat is almost explicit. The unconcealed reactions of the questioners in these two instances help make both of them the type of coercive inquisition and solicitation of information which is interdicted by the Act because of their inherently coercive nature.[20]

Accordingly, I find that both Lastinger and Boroughs conducted interrogation of employees concerning union activities such as would constitute an unfair labor practice under the Act.

VII. THE OBJECTIONS TO THE ELECTION

The statement of objections set forth that the Petitioner's objections alleged the same conduct by the Employer as that alleged in the unfair labor practice charge filed by the Petitioner in Case 2-CA-17609 on October 22, 1980, in which the complaint alleges certain specific misconduct in violation of Section 8(a)(1) and (5) of the Act. The respective sets of allegations were reviewed at the beginning of this Decision and it is clear that they embrace the same sets of circumstances. Accordingly, an independent review of the facts is unnecessary. The unfair labor practices found to have been committed are all violative of Section 8(a)(1) of the Act, and therefore amount to improper interference with the election process, support three of the four objections filed, and warrant setting aside the results of the balloting.

Objections 2 and 4 are sustained by reason of the threats found to have been made of the likelihood of a strike, job replacement, and wage reduction. Objection 3 is sustained by reason of the unlawful interrogations which took place in conversations directly between management personnel and two of the salespeople. As previously noted, there is insufficient evidence respecting promises regarding grievance machinery or any other benefits to sustain findings with respect thereto that unfair labor practices were committed or that the acts of the Employer invalidated the election. Consequently, Objection 1 must be dismissed.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Local 305, Retail, Wholesale and Department Store Employees Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By engaging in the following conduct, the Respondent committed unfair labor practices in violation of Section 8(a)(1) of the Act: unlawfully interrogating employees and threatening employees with loss of jobs and reduction of wages and benefits if they selected union representation.

4. The following described employees of the Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time sales employees employed by the Respondent at its facility located in the Galleria Mall, White Plains, New York, excluding all other employees, guards and supervisors, as defined in the Act.

5. On or about August 18, 1980, and at all material times thereafter, Charging Party Local 305, Retail, Wholesale and Department Store Employees Union, AFL-CIO, represented a majority of employees in the above appropriate unit and has been the exclusive representative of all said employees for the purposes of collective bargaining within the meaning of Section 9(a) of the Act; and the Respondent was on that date, and has been since, legally obligated to recognize and bargain with that Union as such.

6. By refusing, upon request, to bargain in good faith with the Union as the representative of its employees in the unit found above to be appropriate, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

7. By reason of the fact that the Employer carried out coercive interrogation and has threatened loss or reduction of profit sharing and medical benefits and loss or reduction of wages and employment if Local 305 won the election, and thus committed unfair labor practices as alleged in the complaint and which invalidated the election conducted on October 17, 1980, Objections 2, 3, and 4 to the said election must be sustained.

8. The above-described unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

9. The Respondent did not engage in any unfair labor practices other than those found herein.

THE REMEDY

The General Counsel urges that the Respondent's lawful conduct is sufficiently serious to warrant the issuance of a bargaining order. The Respondent points out that there has been a complete turnover in employment among the sales personnel in the store.

The nature of the violations which I find were committed by the Respondent requires that a bargaining order be issued. Threats to job security have been characterized as serious, and even flagrant, forms of interference with the rights of employees under Section 7 and are deemed to be among the less remediable unfair labor practices.[21] The Respondent has met the basic requisite for the issuance of a bargaining order by committing unfair labor practices which patently had the effect of undermining the Union's majority and making a fair election unlikely.[22] For purposes of a bargaining order, it is

[20] *Jefferson National Bank*, 240 NLRB 1057, 1070-71 (1979).

[21] *El Rancho Market*, 235 NLRB 468, 476 (1978).

[22] *N.L.R.B.* v. *Gissel Packing Co., Inc.*, 395 U.S. 575, 610 (1969).

sufficient if the Employer's unfair labor practices have a tendency to undermine majority strength and impede the election process.[23] The acts in question so tended because of their highly coercive intent and effect. I take into consideration, in addition, the small size of the employee complement[24] and the history of similar misconduct by the Respondent's corporate parent involving the same corporate counsel.[25] Accordingly, the propriety of the issuance of a bargaining order has been demonstrated.

That the Respondent's conduct undermined the Union's majority is evidenced by the very fact of the Union's having lost the election.[26] Its conduct in this respect may have a direct bearing upon its right to challenge the existence of a majority because of subsequent personnel turnover. In *Tower Enterprises, Inc., d/b/a Tower Records*, 182 NLRB 382 (1970), the employer's campaign against the union began immediately after the union's demand for recognition, as did the Respondent's (herein) campaign against Local 305. The administrative law judge concluded that by its unlawful conduct, *Tower Records* forfeited its right to challenge the union's majority at a subsequent date "and subsequent turnover became irrelevant in resolving the majority issue."[27]

Thus, the question of whether a bargaining order should be issued in the first instance is guided by the same rules which govern enforcement of bargaining orders. The law is well settled that rapid turnover of personnel and long delays are not grounds for refusing to enforce a bargaining order. Conditions must be treated as they existed at the time of the commission of the violations of the Act.[28] The Supreme Court has specifically rejected the contention that lapse of time between the commission of an an unfair labor practice and the Board's final order precludes enforcement of a bargaining order.[29]

In view of the recommendation herein that a bargaining order issue, it is recommended further that the election in Case 2-RC-18810 be set aside and that the petition in that case be dismissed.

[Recommended Order omitted from publication.]

[23] *N.L.R.B.* v. *Ultra-sonic De-burring, Inc., of Texas*, 593 F.2d 123 (9th Cir. 1979).

[24] *El Rancho Market*, 235 NLRB 468 (1978).

[25] *Honolulu Sporting Goods Co., Ltd.*, 239 NLRB 1277 (1979).

[26] See *Arbie Mineral Seed Co.* v. *N.L.R.B.*, 438 F.2d 940, 945 (8th Cir. 1971) (undermining of a union majority by unfair labor practices is "typically evidenced by the union losing an election").

[27] 182 NLRB at 387. Accord: *Tipton Electric Company*, 242 NLRB 202 (1979).

[28] *N.L.R.B.* v. *L. B. Foster Company*, 418 F.2d 1 (9th Cir. 1979) (complete turnover of personnel and lapse of 3 years); *L'Eggs Products, Incorporated* v. *N.L.R.B.*, 619 F.2d 1337 (9th Cir. 1980).

[29] *N.L.R.B.* v. *Benne Katz, etc. d/b/a Williamsburg Steel Products Co.*, 369 U.S. 736 (1962). The Court noted that Congress has introduced no time limitation into the Act except that contained in Sec. 10(b). *Id.* at 748.